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January 16, 2015

VIA E-MAIL TO: mark.lawrence@state.de.us
The Honorable Mark Lawrence
Senior Hearing Examiner
Delaware Public Service Commission
861 Silver Lake Boulevard, Suite 100
Dover, DE 19904

RE: PSC Docket No. 14-132

Dear Senior Hearing Examiner Lawrence:

You requested the parties to respond to your email dated January 14, 2015, regarding their positions on holding the record open to take into account whatever action the Federal Open Market Committee ("FOMC") takes at its quarterly meeting, which you found on your Comcast internet home page. Your concern is that the cost of capital evidence will be "stale" by the time you issue a recommended decision in this case.

I write on behalf of both Staff and the Division of the Public Advocate ("DPA"). We are opposed to re-opening the record in this proceeding to introduce evidence of what the FOMC may do at its next quarterly meeting in March. First, Delaware law clearly prohibits an administrative agency from considering any of the information related to the upcoming FOMC meeting. Second, contrary to Artesian's position, we do not believe that this is an appropriate subject for judicial notice. Third, we disagree that the evidence on which you must base your decision is "stale."

First, Delaware law holds it is improper for an administrative agency to base its decision on its own information and/or on information outside the evidentiary record. *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998); *see also Veid v. Bensalem Steel Erectors*, 1999 WL 1240843 (Del. Super., Sept. 29, 1999) (holding that the rationale in *Turbitt* is applicable to a variety of administrative agencies and types of litigation). None of the parties requested Your Honor to consider any information from the FOMC, nor did any of the parties enter such prospective information from the FOMC into evidence. Rule 2.9(C) of the ABA Model Code of Judicial Conduct (2007) provides an important guide: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may

properly be judicially noticed." [1] Thus, regardless of how Your Honor learned of the FOMC's next quarterly meeting, it is not an appropriate consideration in this case.

Nor do we believe that the doctrine of judicial notice applies to Your Honor's proposal. Although a judge may take judicial notice of a fact outside the record, that fact ***must not be subject to reasonable dispute*** and the parties must be given prior notice and an opportunity to challenge judicial notice of that fact. *Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008). Here, the facts regarding the costs of capital and interest rates are, indeed, in dispute and the parties have adequately and fully presented evidence on the record as to what the proper costs of capital should be. Hence, it would be improper for Your Honor to use judicial notice to substitute other facts outside the record for evidence which has already been admitted into the record. *Fawcett v. State*, 697 A.2d 385, 388 (Del. 1997) (if there is any possibility of dispute, the fact cannot be judicially noticed) (*citing Communist Party of United States v. Peek*, 127 P.2d 889, 896 (Cal. Super. 1942) (internal quotations omitted); *see also Tribbitt*, 963 A.2d at 1131, no. 15 ("We also note that the Family Court judge should not have taken 'notice' of information she had 'read about' to support her view that banks would be less likely to hire a candidate with a bad credit history, a view contrary to that of the Husband's expert.").

Your Honor also cannot use judicial notice of the FOMC's actions regarding interest rates or costs of capital because not only are these facts specifically in dispute, but "judicially noticed facts "must be either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b). The Board of Governors of the Federal Reserve System makes policy decisions on a prospective basis—just as the Commission must do for rate cases—and even posts selected interest rates on a ***weekly basis***. When facts (such as interest rates) are constantly changing, the Commission (and Your Honor) must make its decisions based on the test year and/or test period chosen by the utilities when they file a rate case. If the Commission chose to ignore the information shown in such chosen test year or test period, it would be violating its own regulations. See 26 *Del. Admin. C.* §1002-1.2.

Even if Your Honor were to allow the parties to brief the issue of how a decision by the FOMC would affect the costs of capital, such briefing would not be ***evidence in the record*** upon which you or the Commission could rely. If such information is not record evidence, taking judicial notice of such information would be a reversible error of law because a trier of fact cannot rely on its own independent search for evidence even if found during an evidentiary hearing. *Ney v. Ney*, 917 A.2d 863, 867-68 (Pa. Super. 2007) (concluding that, in absence of other evidence in the record, trial court erred in relying on its independent Internet search, even where search conducted during hearing and party questioned on search results).

Your Honor also may not reject the evidence already placed in the record based on its alleged "untimeliness." For example, in *Turbitt*, the Delaware Supreme Court rejected a decision

[1] Generally, that well-established principle is assiduously adhered to by members of the Delaware judiciary. *Tribbitt v. Tribbitt*, 963 A.2d 1128, 1131 (Del. 2008). The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates.

by the Industrial Accident Board because such board used its administrative expertise as a basis for rejecting competent, uncontroverted medical evidence. 711 A.2d at 1214. In its reasoning, the Court specifically stated that "general observations concerning outdated material [would] not suffice to provide an independent basis for fixing a different percentage of disability" in a case involving the Board. *Id*. at 1216. In addition, a hearing examiner may not reject evidence on the basis of credibility unless supported by specific references to the evidence of record that prompts such disbelief. *Id*. at 1216; *Lemmon v. Northwood Constr*., 690 A.2d 912, 913-14 (Del. 1996). Your Honor has cited to no such evidence to show why the expert witness testimony presented by the Company, DPA or Staff should not be relied upon for a decision on the cost of capital. We urge Your Honor to review and rely on the evidence already presented to you and introduced into the record on the issue of cost of capital.

Finally, both cost of capital witnesses have taken into account what expectations are for the market going forward.

Respectfully submitted,

/s/ James McC. Geddes

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JG/jmd

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